No. 12013

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOSEPH BARSOCK,

Appellant and Defendant,

vs.

UNITED STATES OF AMERICA,

Respondent and Plaintiff.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

Appellant, a 22-year-old Negro, was convicted of the murder of Naval Chief Petty Officer Jepson at the Naval Reservation, Long Beach, California, committed during the early morning hours of April 3, 1948. Jurisdiction was acquired by the District Court under the indictment filed by the Grand Jury pursuant to Title 18, U. S. C. A., Sections 451 and 452. He was convicted of murder in the first degree under Count I of the indictment [Clk. Tr. p. 2], and sentenced to life imprisonment [Clk. Tr. p. 27]. He filed his Notice of Appeal to this court [Clk. Tr. p. 31], it having appellate jurisdiction since the punishment was other than death (18 U. S. C. A. 681, and 28 U. S. C. A. 1291).

Two specifications of error are relied upon, the first being that the defendant was the subject of an illegal arrest and detention at the time of the killing, and hence the homicide was manslaughter rather than murder in the

first degree, and that the court erred in instructing the jury that the legality of the arrest or custody was immaterial. Secondly, defendant was placed in jeopardy, upon the empaneling of the jury, for murder in two counts, Count I charging murder of the first degree [Clk. Tr. p. 2], and Count II charging murder in the first degree arising out of the perpetration of a robbery, both referring to killing Jepson. The court entered a judgment of acquittal, during the course of the trial as to Count II which acquittal appellant contends constituted a bar to the charge contained in Count I, and that the court erred in not allowing appellant to enter his plea of jeopardy.

Appellant previously at age 17 enlisted in the United States Navy from Louisiana, and thereafter served in the Pacific War Theatre on various ships as a Steward's Mate, and was discharged from the service, December 10, 1947 [Rep. Tr. p. 529]. Shortly thereafter he was convicted of illegally wearing a naval uniform, a misdemeanor (10 U. S. C. A. 1393). He was thereafter discharged from the Los Angeles County Jail on March 31, 1948 [Rep. Tr. 497, p. 24]. On April 2, 1948, he went to the Naval Reservation illegally in a Navy uniform, for the purpose of validating his previously issued naval railroad ticket to Louisiana [Rep. Tr. 306, and Ex. 15]. The transportation office on the reservation was closed, and appellant decided to stay overnight in the barracks because it was raining [Rep. Tr. pp. 531, 532 and 547, line 6]. He became involved with naval personnel over a blanket when he sought to retire. About midnight he left the Naval Reservation by climbing over the fence, and started to walk down the public highway toward Long Beach. He was stopped by naval personnel from the Naval Reservation, and at the point of a gun held by Chief Petty

Officer Cox, was forced into a naval station-wagon, and was thereafter taken to and held by naval personnel at the reservation [Rep. Tr. p. 533, line 19, and p. 283, line 3]. It is undisputed that the naval personnel thought the appellant was an enlisted man of the United States Navy, and further that appellant did nothing to change this opinion. Appellant was thus returned from the open public highway to the Naval Reservation against his will and over his protests, and was taken to the naval brig for confinement [Rep. Tr. p. 535, line 6]. A naval confinement paper referred to as a Report Slip, Exhibit 8, was issued and signed by the naval officer in command, and it was by virtue of this naval confinement document that appellant was ordered confined [Rep. Tr. p. 300]. He was being escorted by an armed guard from the dispensary in route to the brig, at the time he over-powered his guard in the darkness [Rep. Tr. p. 537, line 7]. Appellant told the guard, "don't holler, because I don't want to hurt you, all I want to do is get away" [Rep. Tr. p.538, line 3]. During the time of the struggle, deceased by coincidence walked around the corner of a building that blocked appellant's escape and at some 60 feet, appellant shot in the dark with the guard's gun. In his language, "I whirled (from fighting with the guard), and grew tense, put pressure on the trigger, and the gun went off, and I heard someone fall, and he groaned, and I ran" [Rep. Tr. p. 538, line 6]. Appellant turned (from the guard) because he was afraid of being locked up, according to his testimony [Rep. Tr. p. 564, line 14].

Appellant immediately fled from the scene of the shooting, running past the body of deceased, and left the reservation, sneaking out through the main gate. He was apprehended shortly thereafter with the death gun in hiding on a deserted ship [Rep. Tr. p. 539]. He made a full confession of his acts to agents of the Federal Bureau of Investigation [Rep. Tr. p. 483]. The trial court instructed the jury that the legality of the arrest and detention was immaterial, over strenuous objection.

As already it has been pointed out, appellant was charged with murder in two counts, the first being murder of Jepson [Clk. Tr. p. 2], and the second count being murder of Jepson arising out of a robbery, to-wit: the guard's gun [Clk. Tr. p. 3]. The second count was disposed of by a judgment of acquittal, and appellant then attempted to interpose a plea of jeopardy arising out of the disposition of Count II as to Count I, being the count upon which he was convicted. While other assignments of error were made during the course of the trial, appellant now concedes that such error if any, would not be prejudicial, by reason of the jealous regard of the civil rights of the defendant, accorded by the patient and painstaking trial judge. The record is free of any misconduct on the part of the prosecuting attorney, who presented the case with firmness resulting in conviction in the first degree, but without any over-reaching as to the rights of the appellant. However, appellant confidently presents the two specifications of error, and strenuously urges them as grounds for reversal, they constituting errors of the mind and not of the heart.

SPECIFICATION ASSIGNED ERROR— NUMBER ONE.

The trial court erred in instructing the jury "it is immaterial whether or not the arrest, detention, and custody of the defendant by Navy personnel, other than the deceased Jepson, or the acts and conduct of such other Navy personnel before the killing, were lawful or unlawful," and in refusing defendant's instruction No. 2, regarding self-defense, to-wit: Section 50, California Civil Code, and defendant's instruction No. 22, regarding California arrest procedure quoted from Sections 841, 835 and 858, California Penal Code, all of which was excepted to during the course of the trial [Rep. Tr. pp. 581 to 588, and p. 599, line 10, to p. 601, line 1]. (See appendix B for full quotation of specified error.)

THE ARREST AND DETENTION WERE UNLAWFUL.

Appellant in his trial memorandum filed before the commencement of the trial, asserted that the arrest and restraint was unlawful, and that the homicide could be of no greater degree than manslaughter. The memorandum concluded with a challenge to the prosecution to legally justify the arrest. Appellant thereafter, repeatedly, throughout the trial, argued the proposition that appellant being a civilian, was not subject to arrest or detention by naval personnel, except for the express purpose of being held for civilian authorities [see Rep. Tr. p. 108, line 12, where appellant challenged the prosecution to justify the illegal arrest, and Rep. Tr. p. 222, line 13, where appellant questioned the authority of the arrest under Exhibit 8, and Clk. Tr. p. 235, line 10, where appellant objected to

the admission into evidence of Exhibit 8, the Navy commitment paper, and Clk. Tr. p. 505, line 11, to p. 521, line 17, being the argument on motion for judgment of acquittal, and Rep. Tr. p. 598, line 8, being discussion incidental to the matter of the jury instructions, and Rep. Tr. p. 672, line 2, where the prosecution discussed the matter of the arrest in the argument to the jury, and Rep. Tr. p. 514 to 516, where appellant requested instructions to the jury, in the language of Section 50, California Civil Code, Sections 841, 835 and 858, California Penal Code, and Section 151, subd. 3, Naval Regulations].

Appellant was first arrested without a warrant and taken into custody, while walking on the open highway en route to Long Beach, outside the Navy Reservation. Hence, the legality of his arrest, by the naval officer, is determined by applicable California State statutes, *United States v. Di Re,* 68 Sup. Ct. 222, 92 L. Ed. (Adv. Ops.) 218 (1948), and *Johnson v. United States,* 68 Sup. Ct. 367, 92 L. Ed. (Adv. Ops.) 323 (1948). In the *Di Re* case, the court said:

> "We believe, however, that in absence of an applicable Federal statute, the law of the State where an arrest without warrant takes place, determines its validity." (68 Sup. Ct. 226.)

The court further said:

> "No act of Congress lays down a general Federal rule for arrests without warrant for Federal offenses. None purports to supersede State law." (68 Sup. Ct. 227.)

To the same effect, see

> *Johnson v. United States,* 68 Sup. Ct. 367, 92 L. Ed. (Adv. Ops.) 323 (1948).

When appellant was taken against his will, in the station-wagon, back to the Navy Reservation, the California statutes on arrest still applied. Section 1515, subdivision 1, Naval Regulations, which provides:

> "The commandant or commanding officer of any naval station or other naval reservation situated within the limits of any State, Territory, or District, which has been acquired by the United States through purchase or otherwise for naval purposes, and over which the United States has exclusive jurisdiction, *shall require all persons within the limits of such stations or reservations strictly to observe all existing Federal laws, including the penal laws creating offense not otherwise covered by any act of Congress, of the State,* Territory or District, wherein the station is located in effect on April 1, 1935, and remaining in effect, which have been adopted as Federal laws by section 289 of the United States Criminal Code.
>
> Offenses committed by persons in the naval service within the limits of such station or reservation shall be punished as authorized by the Articles for the Government of the Navy, the Navy Regulations, and the customs of the service.
>
> Persons not in the naval service who commit offenses within the limits of such station or reservation, including the offenses contemplated by section 289 of the United States Criminal Code, are subject to trial in the United States District Court for the district in which the station is situated.
>
> Care shall be taken by commandants and commanding officers to see that any reservations contained in the instrument conveying title to the United States or the act of legislature ceding jurisdiction to the United States are observed."

18 U. S. C. A. 468, Criminal Code, Section 289, provides:

> *"Laws of States adopted for punishing wrongful acts; effect of repeal.* Whoever, within the territorial limits of any State, organized Territory, or District, but within or upon any of the places now existing or hereafter reserved or acquired, described in section 451 of this title, shall do or omit the doing of any act or thing which is not made penal by any law of Congress, but which if committed or omitted within the jurisdiction of the State, Territory, or District in which such place is situated, by the laws thereof now in force would be penal shall be deemed guilty of a like offense and be subject to a like punishment; and every such State, Territory, or District law shall, for the purposes of this section, continue in force, notwithstanding any subsequent repeal or amendment thereof by any such State, Territory, or District."

The applicable California statutes on the matter of the arrest, are set forth in Sections 835, 841, 849 and 858, California Penal Code, which provides as follows:

> "835. *Restraint Limited to Necessity.*—An arrest is made by an actual restraint of the person of the defendant, or by his submission to the custody of an officer. The defendant must not be subjected to any more restraint than is necessary for his arrest and detention."
>
> "841. *Notice of Authority and Intent to Arrest.*—The person making the arrest must inform the person to be arrested of the intention to arrest him, of the cause of the arrest, and the authority to make it, except when the person to be arrested is actually engaged in the commission of or an attempt to commit an offense, or is pursued immediately after its commission, or after an escape."

"849. *Duty of Officer to Take Accused Before Magistrate.*—When an arrest is made without a warrant by a peace-officer or private person, the person arrested must, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the arrest is made, and (1) a complaint stating the charge against the person, must be laid before such magistrate."

"858. *Informing Accused of Nature of Charge and Right to Counsel.*—When the defendant is brought before the magistrate upon an arrest, either with or without warrant, on a charge of having committed a public offense, the magistrate must immediately inform him of the charge against him, and of his right to the aid of counsel in every stage of the proceedings."

Chief Petty Officer Cox committed at least a misdemeanor under the California law, when acting without a warrant, he forced appellant into the station-wagon on the highway to Long Beach [Rep. Tr. p. 282, Sec. 146]. California Penal Code, Section 146, which state:

"146. *Officer Acting Without Regular Process.*—Every public officer, or person pretending to be a public officer, who, under the pretense or color of any process or other legal authority, arrests any person or detains him against his will, or seizes or levies upon any property, or dispossesses any one of any lands or tenements, without a regular process or other lawful authority therefor, is guilty of a misdemeanor."

When Chief Cox took appellant into custody on the highway, the state law applied, and when he drove him against his will onto the Naval Reservation, the statutes making state law applicable to government reservations

became applicable. These statutes were Section 1515, Naval Regulations, and 18 U. S. C. A. 468, Criminal Code 289, *supra*. Thus the foregoing California statutes concerning the mode and legality of the arrest of appellant governed the situation, both on and off the Naval Reservation. Chief Cox did not comply with state law, Section 841, Penal Code, by notifying appellant as to "the cause of arrest." It is fundamental that the arrest must be sustained upon the grounds stated at the time, and can not be thereafter justified on other grounds (*United States v. Di Re, supra*). Hence appellant was illegally arrested outside the Naval Reservation, and also illegally held in custody (not for the purpose of turning him over to civil authorities) on the Naval Reservation at the time of the killing. The naval personnel were guilty of false imprisonment, a misdemeanor, Section 236, Penal Code, and appellant had the right to resist, Section 50, Civil Code, and Section 692, Penal Code, making it lawful to resist the commission of a public offense, and of self defense.

Sections 236 and 237, California Penal Code, provide:

> "236. *What Constitutes.*—False imprisonment is the unlawful violation of the personal liberty of another."
>
> "237. *Punishment.*—False imprisonment is punishable by fine not exceeding five hundred dollars, or by imprisonment in the county jail not more than one year, or by both. If such false imprisonment be effected by violence, menace, fraud, or deceit, it shall be punishable by imprisonment in the State prison for not more than one nor more than ten years."

Section 50, California Civil Code, gave appellant the right to break away from the illegal arrest and detention, which section provides:

> "50. *Right to Repel Invasion of Rights by Force.* —Any necessary force may be used to protect from wrongful injury the person or property of oneself, or of a wife, husband, child, parent, or other relative, or member of one's family, or of a ward, servant, master, or guest."

Appellant was a free man, and had the God-given right to walk to Long Beach if he so desired, and the United States Government, acting through Navy Chief Officer Cox, did not have the right to deprive appellant "of life, liberty, or property, without due process of law," Fifth Amendment of the Constitution, and further under the Fourth Amendment, he was protected from unlawful search or seizure, said amendment providing as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Shaw, Presiding Judge, said:

> "The imprisonment being proven, the law presumes it unlawful until the contrary is shown. It is for the defendant to justify it by proving it was lawful." (*People v. Perry,* 79 Cal. App. 2d (Supp.) 906, 180 P. 2d 465-469, quoting from *People v. McGrew,* 77 Cal. 570, 20 Pac. 92.)

To the same effect, see:

35 Corpus Juris Secundum, Section 55, notes 4 and 5.

The language of the majority in *United States v. Di Re,* 68 Sup. Ct. 222-228, 92 L. Ed. (Adv. Ops.) 218 (1948), is particularly applicable to the instant case, in measuring the rights of appellant in view of his submission to the illegal arrest on the highway, and as to his rights in resisting false imprisonment at the time of the killing. The court there said:

> "The Government also makes, and several times repeats, an argument to the effect that the officers could infer probable cause from the fact that Di Re did not protest his arrest, did not at once assert his innocence, and silently accepted the command to go along to the police station. One has an undoubted right to resist an unlawful arrest and courts will uphold the right of resistance in proper cases. But courts will hardly penalize failure to display a spirit of resistance or to hold futile debates on legal issues in the public highway with an officer of the law. A layman may not find it expedient to hazard resistance on his own judgment of the law at a time when he cannot know what information, correct or incorrect, the officers may be acting upon. It is likely to end in fruitless and unseemly controversy in a public street, if not in an additional charge of resisting an officer. If the officers believed they had probable cause for his arrest on a felony charge, it is not to be supposed that they would have been dissuaded by his profession of innocence."

For naval J. A. G. orders and discussion of arrests of civilians by naval personnel, see Appendix A.

HOMICIDE ARISING OUT OF ILLEGAL ARREST MAY BE EXCUSED OR REDUCED TO MANSLAUGHTER.

The general rule is stated in 40 Corpus Juris Secundum, 915, Section 50(b), as follows:

> *"An illegal arrest, detention, or similar act is adequate provocation to reduce a homicide committed in resisting it to manslaughter, at least if the accused knew of its illegality.*
>
> As the rule is ordinarily stated, an illegal arrest or attempt to arrest is adequate provocation to reduce a homicide to manslaughter, unless the homicide was in fact committed with malice, the absence of which is not necessarily established by the fact that the arrest or attempt to arrest was illegal. In order to permit the application of the doctrine there must not only have been an illegal arrest but the killing must have been done in actual resistance to the act of making the arrest and retaining illegal custody of the accused. A mere declaration of an intent to make an illegal arrest unaccompanied by an attempt to do so is not adequate provocation.
>
> The rules as to provocation occasioned by an illegal arrest have also been applied to cases of other illegal or unauthorized violences by an officer, or of illegal detention by officers or private persons."

40 Corpus Juris Secundum 1023, Section 137(b), in part states:

> ". . . if the attempted arrest is unlawful the killing of the officer may be excused or justified as in self-defense if in the course of resistance to the arrest it becomes necessary to prevent death or great bodily harm, or even, according to some authorities, to retain or regain liberty. So, too, one who is restrained of his liberty under an illegal arrest may

use such force as is necessary to regain his liberty, and, if it reasonably appears that the officer intends to kill him or do him great bodily harm in order to prevent his escape, he may kill the officer in self-defense.

A few courts hold that a person has a right to resist an unlawful arrest, even to the extent of taking the life of another, if it is necessary in order to regain his liberty and freedom, or if it is necessary as an alternative to submission. These courts hold that a person has as much right to resist an invasion of his personal liberty, and under proper circumstances to take life, as he has to resist death or serious bodily injury."

The reported federal cases are consistent with the general rule stated above, see *Brown v. United States,* 16 Sup. Ct. 29, 40 L. Ed. 90; *Starr v. United States,* 14 Sup. Ct. 919, 39 L. Ed. 841; *Reichman v. Harris,* 252 Fed. 371-382. Appellant challenges the respondent to show any federal authority inconsistent with the foregoing general rule as stated herein. We submit that there is none.

Presiding Judge Shaw, of the Los Angeles Appellate Department, a court of last resort in California, in the case of *People v. Perry,* 180 P. 2d 465-470, 79 Cal. App. 2d Supp. 906, in interpreting the various provisions regarding California arrest procedure, eloquently said in reference to a false arrest:

"Unless that arrest was lawful, then, as already stated the officers were under no duty to make it, and resistance to their action in the matter was not a violation of section 148, Penal Code (46 Cor. Jur. 874). Moreover, if an arrest is unlawful, either the person being arrested or others acting in his behalf may resist the arrest, using no more than reasonable force for that purpose. This is the effect of sections

692, 693 and 694 of the Penal Code, which provides that lawful resistance to the commission of a public offense may be made by the party about to be injured or by any other person in his aid or defense, either of whom may make sufficient resistance to prevent the offense. These sections apply here because the arrest, if unlawful, is a violation of section 236, Penal Code, and therefore a public offense. This right of resistance was conceded in People v. Craig, 152 Cal. 42, 45, 50, 91 P. 997, where it was held that the arrest was lawful and resistance to it was not justified, but the court said: 'Since the right of a person to resist an unlawful attempt to subject him to arrest cannot be denied * * *,' and further, 'The right of one person to aid another in defending against a threatened injury is defined by our statute (Penal Code, Sec. 694), and does not differ substantially from the right as it existed under the common law. He cannot interfere except in aid of a lawful resistance by the person threatened.' In People v. Dallen (1913), 21 Cal. App. 770, 775, 132 P. 1064, the court said: 'There can be no doubt that a person has the right to 'resist an unlawful attempt to subject him to arrest.' (People v. Craig, 152 Cal. 43, 45, 91 P. 997) but held that in so doing such person cannot take the life of the arresting person, unless he is resisting also threatened danger to his life or limb and may reasonably so do for that purpose. In People v. Bradley (1913), 23 Cal. App. 44, 46, 136 P. 955, the court conceded that an unlawful arrest 'might have been rightfully resisted with the same degree of force employed in making the arrest,' and this concession was quoted with apparent approval in People v. Gilman (1920), 47 Cal. App. 118, 123, 190 P. 205.

Similar decisions may be found elsewhere. Thus in Ryan v. City of Chicago (1906), 124 Ill. App. 188, 190, where the appellant was charged criminally with

resisting an officer who arrested him without a warrant, the court held the arrest illegal because no act done in the presence of the officer was a crime, and held further that 'The arrest being unlawful, appellant had a right to meet force with force, if in so doing he used such force only as was reasonably necessary to repel the assault upon his person.' In *State v. Bradshaw* (1916), 53 Mont. 96, 161 P. 710, 711, the defendant was charged with resisting an officer seeking to arrest him without a warrant, and the court held that if the arrest is not lawful 'the person sought to be arrested may use such force as may be necessary to prevent the arrest.' In State v. Small (1918), 184 Iowa 882, 885, 169 N. W. 116, it was held that where the arrest without a warrant is unlawful because no offense has been committed, 'the party arrested may resist with such force as appears to him, acting as an ordinarily prudent man, to be reasonably necessary. The law jealously guards the liberty of the citizen, and a public officer has no right, because of being clothed with the habiliments of office, to interfere therewith, save as provided.' The court further held that an instruction erroneous which said the defendant owed the duty to submit to the officer, if he knew of his official character at the time, saying, 'He owed no such duty unless, at the time, he was engaged in the commission of a public offense.' "

We conclude in this particular, that both the arrest and detention of appellant were unlawful under the California law and hence, also under the federal law. Further, that the arrest and detention being unlawful, the trial court committed prejudicial error in instructing the jury that the illegality of the arrest and detention was immaterial. The judgment of conviction should be reversed on this ground alone.

SPECIFICATION ASSIGNED ERROR— NUMBER TWO.

The court erred in denying appellant's motion for leave to withdraw his plea of not guilty to Count I, for the purpose of entering the further and additional plea of jeopardy and the court erred in rejecting defendant's offered plea of jeopardy, all of which was duly excepted to [Rep. Tr. p. 503, line 8, to p. 505, line 1]. (See appendix C for full quotation of specified error.)

Count I charged that appellant "with premeditation and with malice aforethought shot and murdered Howard Evert Jepson." By Count II, appellant was charged "in the perpetration of the robbery of Edwin Garven Ballard, and with malice aforethought did shoot and murder Howard Evert Jepson."

In each instance, appellant was charged with the murder of Jepson in the first degree. It would have been an impossibility for him to have murdered Jepson twice, as Jepson was subject to but a single killing. When the appellant was subjected to trial on Count II, he was in jeopardy for the murder of Jepson. The judgment of acquittal, acquitted him of the murder of Jepson and created a jeopardy and bar to the further prosecution of Count I.

The Fifth Amendment to the Constitution provides in part ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . ."

The matter of jeopardy must be specially pleaded (*Brady v. United States,* C. C. A. Kansas (1928), 24 F. 2d 399), hence the motion to enter the plea was proper. Where a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense. (*Morgan v. Devine,* Kansas (1915), 35 Sup. Ct. 712, 55 L. Ed. 1153.) To the same effect see *Rutkowski v. United States,* C. C. A. Mich. (1945), 149 F. 2d 481, and *Montgomery v. United States,* C. C. A. W. Va. (1945), 146 F. 2d 142. Jeopardy was complete on the swearing of the jury. (*Sanford v. Robbins,* C. C. A. Ga. (1941), 115 F. 2d 435.)

There could be but one murder of Jepson.

So when the court entered its judgment of acquittal on Count II, appellant was acquitted of having murdered Jepson. This created an effective bar by way of jeopardy to the further prosecution of Count I charging appellant with the murder of Jepson. Liberality as to the joinder of offenses, provided by Rule 8(a), Rules of Criminal Procedure, does not cure the jeopardy, as stated in the Constitution.

CONCLUSION.

This brief would not be complete, if no reference were made to the rather unusual circumstances under which this appeal has been prosecuted. Counsel for appellant had informed him as to his rights by letter, which letter was referred to at the time of sentence [Rep. Tr. p. 719, line 22]. Attorney Joseph Stone had been previously appointed to defend appellant by reason of his service on the Los Angeles County Bar Association Committee to Aid Federal Indigent Defendants, and attorney Caryl Warner had been appointed from the federal bar, the day before the commencement of the trial to assist Mr. Stone, the charge being a capital offense [Clk. Tr. p. 709, line 20, to p. 710, line 7]. At the time of the passing of sentence, the appellant in open court stated that he was satisfied with the verdict and with the sentence of life imprisonment, and that he did not desire to either move for a new trial, or to appeal, although counsel indicated their willingness to proceed with the matter [Rep. Tr. p. 717, line 21, to p. 718, line 18]. However, following the passing of sentence, appellant had a change of heart, and this appeal has thus been perfected and presented. As a matter of further coincidence, both counsel are lieutenants in the United States Naval Reserve, and are attached to Volunteer Legal Reserve Unit No. 11-2.

Counsel are appreciative to Mr. Robert Parker, of Parker and Company, veteran law printers of Los Angeles, for his assistance in making the printing of this possible, and for his support of the federal defense program of the Los Angeles Bar Association.

We do not condone the killing of an innocent man. Our sympathy goes to the bereaved family. However, we do urge that appellant was entitled to his proper meas-

ure of the law. This is one of the precepts of the America that Joseph Barsock together with some 15,000,000 other men and women fought for in World War II, and the America that we must all continue to defend in the future. Whether a defendant be the humblest citizen, or the most dastard criminal, he should not be subjected to a first degree murder life imprisonment for a crime that could have been no greater than manslaughter. We earnestly contend that our position is sound, and that the judgment of conviction should be reversed.

Respectfully submitted,

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APPENDIX "A."

The JAG Journal, a carefully edited, but unofficial publication, of the Judge Advocate General of the Navy, Washington, D.C., October, 1948, issue, in an article entitled "Arrests in the Navy" by Comm. L. B. Castro, U. S. N., is illustrative of the foregoing matters. Commander Castro there in part said:

"There are two safeguards against misuse of the power of arrest provided for in Naval Courts and Boards, sections 101 and 60. The section first cited makes false imprisonment an offense under the purview of article 22, A. G. N. False imprisonment is described therein as 'any unlawful restraint of another's freedom of locomotion in any place whatever. It may be in a prison, in a house, or in a public street. There need be no actual force, but the person must reasonably apprehend force in case he does not submit. It must be against the will of the person imprisoned.' Section 60 punishes the 'maltreatment of a person subject to his orders.' The situations contemplated by this section would cover the maltreatment of an arrestee by the arrester, if without justifiable cause . . . In the case of a civilian who commits an offense outside the limits of the reservation in violation of State laws and thereafter returns to the reservation, a warrant for his arrest is sufficient authority to deliver the man to the main gate of the yard or reservation and there turn him over to the proper civil authorities. Likewise, a civilian unconnected with the naval service, who happens to be inside the reservation, should be taken to the yard gate and delivered to the custody of the civil authorities . . ."

Commander Castro further states:

"Civilians who commit crimes within a naval reservation may be arrested by officers of the Navy or Marine Corps. The civilians would be retained in custody until such time as they could be turned over to the proper civil authorities of the United States. They may not be arrested except on the Government reservation. Outside of the Government reservation, the arrest should be made by civil authorities. (C. O. M. 48, 1920, 9.)"

Court Marshal Order 48, 1920, 9, in part provides as follows:

". . . In the enforcement of said general orders (National Prohibition Act) officers of the Navy or Marine Corps are authorized to arrest civilians who are apprehended in the act of violating any provisions of said orders and retain them in custody no longer than is necessary to turn them over to the proper civil authorities of the United States. They are not, however, authorized to arrest civilians except on the Government reservation. Outside of the Government reservation, within the zone described by the General Orders, or outside of said zone, arrests should be made by the civil authorities.

As stated by Mr. Justice Story in United States v. Travers (28 Fed. Cases No. 16, p. 537):

'In a military post or garrison, every person who is voluntarily there either as a visitor or guest, is bound to observe peace and order, and to conduct himself inoffensively. If he excite a riot, if he attempt to stab or

wound or kill anyone within the lines (p. 10), he is liable to be arrested and detained until he can be placed in the hands of proper tribunals having jurisdiction to punish him. It is not competent for mere military officers in such case to apply imprisonment by way of punishment; but it is their duty to apply it, if necessary, to prevent bloodshed and to restore peace, and to keep the offender in order to answer over to a competent tribunal.'

The specific offenses referred to by Mr. Justice Story are felonies, but the rule is the same in misdemeanors—and violation of the executive orders above referred to is punishable as a misdemeanor.

With reference to arrest of offenders apprehended in the zone and not on the Government reservation, the fact should be reported to the United States Commissioner of that District, or to the United States marshal, and a warrant obtained for the arrest of the offender, which should be served by the United States marshal, or someone legally deputized to act for him." (File 29163-2, sec. nab., Feb. 24, 1920.)

APPENDIX "B."

The Court:

"In addition to the instructions which I have indicated, I will give the following instructions which I have written this morning:

'The evidence which has been admitted as to the conduct of the defendant during the course of the evening of April 2, and early morning of April 3, prior to the time of the killing of Jepson, and the apprehension, arrest, and detention of defendant and the acts of the Navy personnel in connection therewith were admitted in evidence for the purpose of aiding you in the determination of the questions of whether or not, beyond a reasonable doubt, the defendant actually did kill Jepson, and if so, whether or not, beyond a reasonable doubt, such killing was done intentionally, willfully, deliberately, maliciously, and premeditatively.

'The evidence in the case is not to be considered by you in connection with whether or not the arrest, detention and custody of defendant by Navy personnel, other than the deceased Jepson, prior to the killing, was lawful or unlawful.

'It is immaterial whether or not the arrest, detention and custody of defendant by Navy personnel, other than the deceased Jepson, or the other acts and conduct of such other Navy personnel, before the killing, were lawful or unlawful.'

You may note your exceptions now.

Mr. Warner: In order to get this straight, I understand that it is necessary for the defendant to preserve his objections to except to any instructions?

The Court: Yes.

Mr. Warner: That is ordinarily done at the conclusion of the charge. But with the court's permission, at this time the defendant excepts to the giving of the instruction just stated by the court for the following reason:

It is material whether or not the defendant was, first, lawfully arrested and, secondly, lawfully detained at the time in question. It is material for the reason that it goes to whether or not the homicide was justifiable, whether it was through heat and passion or making it manslaughter, or whether it was murder in the first or second degree.

We submit further that the facts surrounding the arrest are undisputed and that it is a matter of law for the court to declare to the jury what the status was at the time.

We have already submitted an instruction—

The Court: You say it is a matter of law?

Mr. Warner: Yes.

The Court: That is why I am telling the jury that it is immaterial.

Mr. Warner: But it is a matter of the law that the arrest was illegal and that the detention was illegal and the court should so instruct the jury.

The Court: If you wish an instruction on that I will instruct them that it was legal, but I am telling them that it is immaterial, that is, the acts and conduct of all the other Navy personnel except Jepson. Now the jury can take into consideration anything they want concerning the acts and conduct of Jepson because he was the man that was killed.

Mr. Warner: Very well. We have excepted and pointed out the reasons why, in our opinion, that it is proper. I believe I have already made the point.

The Court: May I suggest this, that in addition to all of the reasons that you have now assigned, if you have assigned any other reason during the course of the trial or the conference on instructions which now have escaped your mind momentarily, they may be deemed to have been urged at this time.

Mr. Warner: Yes. We make that further objection and exception. Thank you, your Honor.

The Court: And the rule is that the exceptions must be taken before the retirement of the jury. I usually permit them to be taken before they argue to the jury so that the record will show when the jury retires that they have been made and counsel of course may, at the conclusion of the instructions, make any other exceptions which might occur to them during the course of the giving of the instructions."

APPENDIX "C."

"The Court: It seems to me like the defendant is either guilty of murder in the first degree or he isn't. I may be stretching a point, but I doubt, with the evidence in this case, that I would be justified in denying a motion to dismiss the second count, and the motion to dismiss the second count will be granted.

Mr. Champlin: Very well, your Honor.

The Court: That is to say, there will be a judgment of acquittal on the second count. However, that is only as to the robbery, and leaves pending the first count.

Now, do you have another point on your first count?

Mr. Warner: Do I understand now that the second count has been dismissed?

The Court: The second count is dismissed.

Mr. Warner: At this time the defendant asks leave of court to withdraw his plea of not guilty to count 1 for the purpose of entering a further and additional plea of jeopardy.

The Court: A plea of jeopardy?

Mr. Warner: Yes, sir, that's right.

The Court: The motion is denied.

Mr. Warner: At this time the defendant offers to plead to count 1, in addition to the plea of not guilty heretofore entered, the plea of once in jeopardy as to count 1, in that on or about, whenever it was, the 7th day of June, 1948, in the Federal District Court of this particular court, the defendant was charged with murder in count 2 of the indictment in this case—just a moment, let me get our papers here—and that a jury was empaneled and sworn to try him, witnesses were sworn and testified against him, and that on this 11th day of June, 1948, the said charge,

count 2, was dismissed upon a judgment of acquittal entered.

The Court: The judgment of acquittal as I read the civil rules here means a judgment of acquittal for failure of proof, not a judgment of acquittal in the ordinary sense.

If the Supreme Court intended it to be that way, where there are several counts in an indictment—

Mr. Warner: Other counsel had in mind the original indictment that was dismissed here.

The Court: Was it dismissed?

Mr. Warner: No, that is a little different.

The Court: If the Supreme Court intended in a multiple-count indictment, where judgment might be granted on a motion such as made here, that that would be once in jeopardy, they are the ones that are going to have to decide that. Otherwise the making of motions for dismissal or judgment of acquittal on failure of proof would become a mere form. It wouldn't have any substance, because no judge is going to work in a situation like that and dismiss a count if technically it is going to result in a dismissal of all counts in an indictment.

Mr. Warner: I was brought up in the school, your Honor, to make those motions and make those objections.

The Court: Counsel, I commend you for making them. It is your duty, and you are doing it very well, both of you. It is your duty to do everything which the law permits you to do in the defense of your client, and it is your duty, above all, to see that the government is forced and compelled to prove your client guilty beyond all reasonable doubt."